

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



74-1663

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Case No. 74-1663

JOHN J. SPENCER, JR.,  
Appellee,

- vs -

JOHN J. SPENCER, JR.,  
Appellant.

DEFENDANT'S BRIEF

JOHN J. SPENCER, JR.  
Attorney for Defendant-Appellant  
Office: P.O. Address  
10 East 40th Street  
New York, New York 10016  
(212) 680-4800

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-----X  
UNITED STATES OF AMERICA,  
  
Plaintiff-Appellee,  
  
-against-  
  
RICHARD THORNE a/k/a "OM",  
  
Defendant-Appellant.  
-----X

Docket No: 74-1663

## FACTS

Defendant was convicted on both counts of an indictment, (1) Possession of counterfeit currency, 18 U.S.C. 472 and (2) Possession of plates and negatives used to print that currency, 18 U.S.C. 474 and aiding and abetting both those offenses, 18 U.S.C. 2. The conviction was based solely upon circumstantial evidence; that is, no one at trial testified that they had ever seen the defendant either printing counterfeit or having it or the plates in his possession.

The Government's case-in-chief (which defendant contends is all that should be considered on this appeal) is based upon only the Government's search and subsequent seizure at a loft located at 146 West 25th Street, New York City of (a) plates used to print counterfeit, two of which had defendant's fingerprints thereon and (b) seizure at the loft of half printed counterfeit bills which had, mingled amongst them, a piece of paper similar in size to a dollar bill which contained writing allegedly done by the defendant and another piece with defendant's fingerprint.

The defendant was, and is, the leader of a group called the "Om Lovers". The loft premises was occupied at various times by certain of the Lovers and others. Defendant himself was present at the loft on various occasions, but according to testimony lived elsewhere.

The Government based its entire case-in-chief on the above, namely the fingerprints on the plates and paper and handwriting of the defendant, on a piece of paper the same size as a bill, allegedly written by the defendant and found among other pieces of counterfeit which in conjunction with defendant's Lover's and his own presence at the loft the Government used to create a circumstantial case against the defendant.

Certain other facts will be gone into in greater detail in the body of the brief.

The defendant appeared pro se with counsel present at the defense table to assist and advise.

POINT I

DEFENDANT'S PRETRIAL MOTION  
PURSUANT TO RULE 41(f) F.R.  
CRIM.P. SHOULD HAVE BEEN  
GRANTED.

Defendant moved prior to trial, for an order (1) Supressing evidence consisting of a statement made at the time of his arrest on October 6, 1973 and (2) Supressing evidence consisting of counterfeit currency, plates and a plate-maker, seized by the Secret Servent Agents on the loft premises at 25th Street on August 1, 1973. The motion was denied. (Memorandum and order, Brieant, J. 3/21/74).

Defendant's position is that the trial court was in error in denying that motion.

1. Supression of defendant's statements.

Apparently to make absolutely certain that none of the problems as have occurred in this case do occur, the Government has prepared a form No. 1737, (Government's Exhibit "10") which defendant is to sign indicating that (a) he has received his warnings and

(b) I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or force of any kind has been used against me. I hereby voluntarily and intentionally waive my rights and I am willing to make a statement and answer questions.

Defendant signed the top portion "a" but did not sign the bottom "b".

It is the defendant's position that once the Government undertakes to provide this form they are bound by it, and that parole may not be considered on the question of "waiver" of rights. If the defendant in fact, was knowledgeable of the meaning of the form his failure to sign the waiver form could clearly have been construed as a specific intent not to waive his rights and thus during the following discussions defendant may well have been laboring under the belief, rightfully, that because he had not signed the waiver of his rights he still was maintaining them and that all of his conversations could not in fact, be used against him. Indeed, the transcript of the conversation indicates this may well have been the case. Thus, the defendant was entrapped into these conversations under the mistaken belief that they could not be used against him.

Agent Ott moreover compounded the situation by signing the certification that the defendant had<sup>had</sup>/read to him and signed the waiver when he had not, in fact, done so. Moreover Agent Sheafe, who next spoke to defendant testified (Hearing R. 2/8/74 P.12) that he repeated to defendant his rights again but that, "...the tape recorder was not in fact recording our conversation." When the defendant was allegedly given his rights by the agent and when the agent "...start[ed] the interview again so that we could get in on tape" [Hearing R. 2/8/74 P.13] the agent totally failed to put anything on the tape regarding warnings although Agent Sheafe states in his testimony "...we began the interview over." Yet the transcript of this testimony contained the statement on the top: "The initial part of this statement was not taped due to technical difficulties."

The testimony of the agents is not believable or credible. Agent Sheafe testified that the entire warning discussion was omitted when he discovered the tape recorder was not working and then "began...over." Agent Ott testified that as he understood it, "It is by law that you have to give [the waiver]" (Hearing R. 2/8/74 P.41). Yet the waiver was not signed nor was the warning contained on the tape.

In light of the above it can only be concluded that defendant's failure to sign the waiver was a deliberate and conscious attempt for him to preserve his rights and that in the absence of the tape containing the warnings and given Agent Ott's wrongful certification that the defendant had signed the waiver when he had not, all oral conversations as to what rights defendant was given or was waiving be excluded and that this Court only consider the fact that defendant did not sign the waiver of his rights and that therefor his statements should have been suppressed.

The Government should not be heard to contravene its own written statements with respect to such an important issue of defendant's rights.

2. Suppression of evidence consisting of counterfeit currency, plates and platemakers seized August 1, 1973.  
( R. 239 ).

The search warrant for the loft at 146 West 25th Street, was issued on July 26, 1973. On that date the agents in fact, searched the premises and seized certain evidence. Two agents remained on the premises of the loft until the next day. The lock was then changed and a key was given to the landlord as well and one being retained by the Government.

The Government agents returned to the loft premises on August 1st ostensibly to "consider the feasibility, expedite" and facilitate (Brieant, J. Memo. and Order 3/21/74 pp. 6-7), how to move two large printing presses from the premises which could not be removed on July 26th. On that date (August 1st) one agent observed, "in plain view" (Hearing R. 2/4/74 P.4) a roll of paper imprinted in green, sticking out of a wall. (Brieant, J. Memo. and Order 3/21/74 P. 7). The Trial Court found that since counterfeit currency had alleged already been found on the premises in a large amount on July 26th, the Government was justified in a further inspection of the paper on the grounds that it would be reasonable to infer that this roll of paper might be counterfeit. In fact, very little had been found in the loft on July 26th. (Rp. 261-262). After pulling out the roll of paper the agents proceeded to tear down the wall and discovered in the wall additional currency, plates and platenaker. The defendant's fingerprints were found on two of the plates. Therefore, since no other evidence was introduced against the defendant, except for the piece of paper with the defendant's writing, in currency size, the introduction of the plates with defendant's prints was highly prejudicial to the defendant and the failure to exclude this evidence was reversible error.

It is defendant's position that the trial Court committed reversible error in that the evidence found on August 1st was found subject to an unlawful search and seizure for numerous reasons, as follows, and therefore should have been suppressed.

(a) The premises had not been fully secured. The landlord had access to them (Hearing R. 2/4/74 P. 12) and consequently numerous other besides the landlord could have gained access through the landlord. It is impossible to know how many people may or may not have entered the loft in the interim. In addition, Agent Caputo testified that the wall that was torn down had "concrete mix which hadn't solified" (Hearing R. 2/4/74 P.16), although now some seven days had elapsed since the July 26th search. Certainly concrete hardens within seven days thus, giving rise to a possible inference that the loft was not entirely secure. If the agents had remained in possession of the premises, or even completely secured it, the case might be otherwise, but in view of the fact that at least the landlord and perhaps numerous others had access a new search warrant was needed. Unlike U.S. v. American Brewing Co., 296 F. 772 (E.D. Pa.1924) and Levin v. Blair, 17 F.2d 151 (E.D. Pa. 1927) cited by Brieant, J. (Memo Decision and Order 3/21/74 at P.11) the Government had not even retained security on the premises.

Judge Brieant cites these cases for the "converse" implying that August 1st was still within the ambit of time to remove the presses and therefore, the presence of the Government was lawful. But how can this be so if the Government had given up its security on the loft and re-entered again on August 1st?

(b) There was no real reason for one agent to return to the loft on August 1st, let alone three, and such a return was in reality, another search, this time conducted by the "boss" of the operation, Special Agent Sheafe, who was in charge of the counterfeit squad of the New York office. Sheafe claims to have returned to a "secured building" on August 1st, (Hearing R. 2/8/74 P. 4-5) ostensibly to determine how to move the presses. In light of the fact that a substantial moving firm had already been hired (Hearing R. 2/8/74, P.5) to do this job that is patently absurd. Sheafe is "Counterfeiting Agent", not a moving man. Obviously trained and experienced movers would have to inspect the presses personally to determine how they were to be moved - not to be advised by telephone by Sheafe how to move them. In fact, when the presses were ultimately moved they were dismantled and no partitions or walls had to be knocked down to remove them. (Hearing R. 2/4/74 P.53). It is unreasonable to assume that that was the sole purpose of the agents return.

And, if so, why was it necessary for Sheafe to take two other agents with him if his only purpose was to determine how to move the presses. There was absolutely no necessity or justification for three agents to be back in the loft, unauthorized and presumably conducting an unlawful search, once it had been determined that a reputable local firm was retained to handle the move.

(b) Last but perhaps most important of all is the inapplicability of <sup>the</sup> "plain view" doctrine to this case. The Trial Court held that because the roll of counterfeit was "in plain view" he [the agent] was justified in continuing his search. The Trial Court based this on the fact that counterfeit money had already been discovered on the premises "in great quantity" (Brieant, J. Memo Decision 3/21/74 at P.7) In fact, as has been pointed out, hardly any counterfeit had been found in the loft at that time at all and certainly not such a similar "roll of paper". How is it possible to "be reasonable to infer that such a roll of paper...might be counterfeit?" It is respectfully submitted it is not reasonable at all. Moreover, it is inconceivable that the roll of paper was "in plain view". Agent Caputo testified that the wall was in the same condition it was in on July 26th. (Hearing R. 2/4/74 at P.18) when, as he testified, numerous agents and New York City Police were literally crawling all

over the premises. Yet the counterfeit rolls were not seen on the 26th despite this intensive search and despite the fact that the entire legality of the seizure on August 1st is bedrocked on the presumption that the rolls of counterfeit bills were in plain view on August 1st. It is difficult to understand how something could be "in plain view" on August 1st when not seen by numerous agents and police in a three hour plus search on July 26th unless one totally distorts the meaning of the phrase "in plain view". Even if one accepts the agents testimony that he looked down into "a hole" in the wall (Hearing R. 2/8/74 P.20 ). This cannot be concluded to be "in plain view" so as to negate the requirement of a new warrant.

(c) Moreover, inadvertantly the questions of the Assistant U.S. Attorney shows the real purpose of the return by the agents on August 1st.

"Rosenthal Q: Now, Agent Caputo, was anything recovered from the wall to your knowledge on July 25th?

Caputo A: No.

Q: Did any agent search the wall on July 26th?

A: To my knowledge, no." (Hearing R. 2/4/74 P. 24)

Clearly, that was the purpose, to search the wall, because it had been overlooked on July 26th, or alternatively, the agents were unaware of whether or not the wall had in fact been searched.

(d) Finally, even assuming arguendo that the roll of paper was "in plain view", the plates, most crucial to the defendant, were certainly not "in plain view". That is certainly clear by the Hearing Record,

Mr. Geller

Q. After you removed the paper you didn't see the plates, the fifty some odd plates that are involved in this case, did you?

Agent Caputo

A. No Sir.

...No, not until we took the wall down  
(Hearing R. 2/4/74 PP. 54-55; see also p. 78)

It is respectfully submitted then that the Trial Court's reliance on U.S. v. Green, 474 F.2d 1385 (5th Cir. 1973) is misplaced. Here, removing the roll of paper revealed nothing, nothing was uncovered, nothing came into "plain view". Yet the agents, without a further search warrant and despite their seeing nothing, thereupon proceeded to dismantel and tear down the wall thereupon revealing the plates. This action, when nothing at that time was revealed after removal of the roll of paper, constituted a search.

(e) Admittedly it was an assumption and a guess that led the agents to tear down the wall (Hearing R. 2/4/74 P. 56) and not the fact that the plates were in plain view because they were not. This evidence (the plates) contain-

ing defendant's fingerprints was not "evidence...already inadvertently found as stated by Brieant, J. Memo and Order 3/21/74 at Page 13 citing Terry v. Ohio, 1968, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 889; Harris v. U.S. 1968, 390, U.S. 234, 88 S. Ct. 992, 19 L. Ed 1067. The wall had to be torn down to find this evidence. The Trial Court glosses this point over (Memo. and Order 3/21/74 P. 8) in one sentence but it is a big step between taking something "in plain view" and proceeding to tear down a wall to discover things not in view at all. The trial Court failed to make any distinction between between the rolls of paper which, assuming for the sake of argument, were in plain view, and the plates, which were not even "in plain view" when the rolls of paper were removed. Admissability of the former (the paper) does not automatically mean admissability of the latter (the plates) and even if the rolls of paper were admitted the plates should have been suppressed.

(e) Finally, the fact that this was a broader search is evidenced by the fact that a platemaker was found under boxes of ink and paper (Hearing R. 2/4/74 P. 58) The Trial Court found that the agents "limited their activities to the wall," yet, totally unrelated to the wall, agent Simon was busy uncovering a plate maker "beneath...some inks and boxes of paper," Certainly far afield of this wall and indicative of the fact that a search was going on.

Because of all of the foregoing it is defendant's position that a search was conducted on August 1st with respect to all evidence seized but certainly with regard to the plates and it is defendant's further position that by August 1st the search warrant issued on July 26th had become "functus officio" and after having filed the return on July 27th the officers had no authority to conduct this "second search" on August 1st. Cady v. Dombrowski, 413 U.S. 433 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971) and thus all the evidence seized August 1st should have been suppressed and the failure to do so was reversible error.

#### POINT II

THE EVIDENCE INTRODUCED AT THE  
TRIAL WAS INSUFFICIENT TO CON-  
VICT THE DEFENDANT.

Defendant's position is that the evidence introduced by the Government was insufficient to sustain a conviction. The defendant relies principally on a case which it feels is, (after cutting out some of the more unusual aspects of this case given the defendant and his followers) directly on point with the fact pattern of this case, U.S. v. Van Fossen, 460 F. 2d 38, and that that case mandates an acquittal in this one.

Only four pieces of evidence were introduced by the Government against this defendant: (1) A piece of paper (cut similarly to the size of a dollar bill) which bore handwriting allegedly written by the defendant (and although this was contested by the defendant in that he claimed it was not written on that piece of paper, he was never given ample opportunity by the trial Court to prove otherwise. (2) Another piece of paper cut similarly to the size of a dollar bill bearing defendant's fingerprint both of <sup>(1) and (2) above</sup> which were allegedly found grouped with counterfeit found in an office during the search of the loft although admittedly large numbers of papers had been found on that search and (3) Defendant's fingerprints on two plates used in making counterfeit obtained by the Government in what defendant contends was the illegal August 1st search (Point I).

Nothing was ever set forth about the time that this writing was done or that the fingerprints were put on the plates. Indeed, the Government's own expert witness on fingerprints was totally unable to fix any sort of time that the prints may have been put on the plates (R. P.432) Nothing was even introduced by the Government with respect to when the writing may have been placed upon the paper.

Thus, the Government's defects in this case falls four square in the Van Fossen <sup>(Supra)</sup> case. The Government, to secure a conviction was required to establish defendant's possession of plates and currency and his intent to use same illegally or aid and abet another inso doing. Just as in Van Fossen <sup>(supra)</sup>, the flaw in the Government's case is "the failure of the evidence to disclose when the crime was committed and when the defendant's fingerprints and writing were placed upon the items seized in the loft." Concededly, in this case, the loft premises in question were occupied by a group of young men and women who are "followers" of the defendant. However no proof was ever placed into evidence that the defendant occupied the loft and indeed the Government's own witness, the Building Superintendent, testified that the last time he had seen the defendant was five days before the July 26th raid, at a minimum (R-39) and he further stated that numerous other males and females were often present at the loft (R-48) besides the defendant.

Legitimate printing activities were clearly taking place in the loft as the Government's own witness testified to. (R.-74) Indeed "Om Lovers" were constantly printing large amounts of material to disseminate their doctrine. Just as in Van Fossen, (Supra), the Government introduced no evidence to show that the items bearing the

defendant's fingerprints or the paper bearing his writing was not done by the defendant in the course of some legitimate enterprise. Unquestionably defendant could have handled those plates long before they were used for any sort of counterfeiting and his prints remained long after. Similarly the writing could have been placed on that piece of paper under circumstances completely unrelated to the counterfeit. Alternatively his prints may well have been placed upon the plates well after the crime had been committed and when the defendant was shown the plates by his followers, certainly not to be held at that point "possession...with intent to defraud" as charged in the indictment.

Here too, like Van Fossen, (Supra) when the defendant was arrested he had no counterfeit in his possession and nothing linked him with possession of any counterfeit except for agent Sheafe's incredible testimony that the defendant told him he had counterfeit which testimony Sheafe neglected to record and upon retaping the conversation he didn't ask these questions (R- 326a)

Thus, for the above reasons the prosecution rests on conjecture and suspicion. Because no evidence in the record suggests that the prints were impressed (or the writing written) when the crime was committed the jury could only have guessed at this conclusion" Van Fossen, (Supra).

The only other witness presented before the close of the Government's case to show any sort of connection between this defendant and counterfeiting was the landlord who claimed that there was an arrearage in rent which the defendant said he would pay-presumably a "motive" for counterfeiting. If one had a quarter for every person in arrears in rent in New York City at any given time, he could retire a millionaire.

The last piece of evidence of the Government's case to link this defendant with counterfeiting is the tape made of the defendant's conversation with Agent Sheafe (not containing the alleged crucial passages concerning defendant's guilt, which Sheafe testified to) in which tape defendant maintains his denial of any knowledge of counterfeiting until after the fact when his followers spoke to him about it. Certainly the Court cannot hold that the defendant being shown counterfeit currency and plates after the agents had come to the loft premises but before the actual search and seizure constitutes guilt of the crimes charged in the indictment, namely "possession with the intent to defraud", yet the Court erroneously so charged. (See, POINT III). If this is the grounds for defendant's conviction, it totally fails to prove an intent and again calls for conjecture by the jury.

Guilt is an individual concept. The Government's case rests on the fingerprints and handwriting which it then links to this defendant by shreds of circumstantial evidence. No showing was made in the Government's case that the loft was "the defendant's;" it was leased to another; numerous others were present upon the loft or had access thereto; the defendant had been absent from the loft for five days prior to <sup>the</sup> July 26th raid according to the Government's own witness - thus, even a case for "constructive possession" of the currency and plates must fail. The Government has certainly failed in any manner in its case to show dominion and control; totally failed to show constructive possession or even "joint constructive possession". (R-831).

The only evidence the Government showed was that the defendant was the leader of the group who occupied the loft.

From this, the Government's case, to convict, requires, just as in Van Fossen, conjecture and suspicion. Upon the Government's case the jury could only speculate with regard to the counts of the indictment and to convict had to make the inferential jump between the facts of fingerprints and handwriting and occupancy by followers of the defendant. Thus, defendant's motion for a judgment of acquittal should have been granted.

Finally, defendant urges that this Court, in deciding the question of sufficiency of the evidence, should only consider the Government's case-in-chief. See, Moore's Federal Practice §29.05.

This is because while the defendant did not personally testify because the defendant appeared pro se, he did call numerous witnesses all but one of whom was a disciple of defendant and questioned them without benefit of legal training, experience or knowledge of what the consequences and effect of this may have been upon the jury; and also unaware of the weight considerations and technical dangers in going forth with his defense, now brought out with regard to this very appeal. In fact, a cursory reading of the Government's summation shows that almost all its major points are derived from testimony adduced in defendant's case, with respect to defendant's relationship with his Lovers, whom the Government contended blindly followed his instructions and whose testimony revealed an un~~serv~~ing devotion to this defendant. The Government was then in a position to more credibly make its argument to diminish the conjecture and suspicion that remained at the close of its case.

However, in dealing with a layman, this Court is certainly under a greater obligation to scrupulously protect his rights and therefore, it is urged that because of his layman's status and his difficulty in putting proper questions to his own witnesses to elicit facts, that upon review of this record the Court only look to the Government's case-in-chief.

However, it is submitted that even the entire case record still does not solve the Government's problem of insufficiency as set forth in Van Fossen, (supra).

### POINT III

#### THE CONDUCT OF THE TRIAL JUDGE WAS PREJUDICIAL TO DEFENDANT.

Numerous statements were made and decisions rendered during the course of the trial which were highly prejudicial to the defendant especially considering he appeared pro se. Perhaps individually, no one point would require reversing the conviction but the cumulative effect of the following mandates a reversal.

1. Defendant after being promised he would be allowed to do so, (R-300) was denied the opportunity to recall Agent Caputo as his own witness. (R-461).

2. Defendant's attempts to put in his direct case were constantly frustrated by the Trial Judge who often both intimidated the defendant and his witnesses or alternatively made sarcastic, often very funny remarks whose entire effect was to ridicule the defendant and his followers and prejudice the jury; he also took over questioning of the defendant's witnesses in a prosecutorial manner. (R-467, 468, 469, 470, 474, 476, 477, 482, 484, 485, 601 and 630, [where the Court advised a witness of her rights in the presence of the jury] 548, 549, 556, 557, 558, 559, [where the Court structured witnesses statements] 560, 571, 574, 588, 595, 603, 604, 610, 615, 620, 626, 629, 630, 631, 637, 641, 643, 649, 657, 658, 664, 670, 678, 681, 682, 700, 704.

3. Failure to allow witness to recount conversations between the witnesses and the agent (R-502,3).

4. Failure to allow direct examination of witnesses vis-a-vis discussions with the defendant. (R-695).

5. During the Government's case the Court consistently continued to interject humorous comments which prejudiced defendant's case and reduced an already strange trial in terms of the appearance of parties and the fresh flowers that daily bedecked the defense table to a joke. (R- 12-13, 14, 26, 93, 94, 102, 131, 149, 154, 176, 177, 220, 249, 264, 276, 284, 338, 355, 361, 365, 383.)

6. Commenting and charging the jury on the difference in race between the defendant and "his girls" (R-825).

7. Commenting in the Court charge on the definition of "constructive possession". (R-831). What was "constructive possession" with respect to this defendant was a jury question; here the Court defined "constructive possession" as what had occurred, which was error, and which was also misleading, because it makes it appear that the defendant's happening, on the scene after the crime is, at that point in time, <sup>being</sup> /guilty of the offenses charged in the indictment by the mere fact of his being present when plates and counterfeit were secreted and that this therefore, was "constructive possession" so as to make him guilty of a crime charged in the indictment. Indeed, this point, tangentially referred to previously, is crucial because the defendant is charged with possession (constructive or otherwise) with intent to defraud.

The courts charge makes it appear that if and when the defendant was shown the plates and bills after the crime that that was enough to establish "constructive possession" (even though at that point there was no possible intent to defraud) to require a conviction. This totally misleads the jury as to the Government's burden of proof namely, possession with the intent to defraud, and is a most serious error.

At most it would establish a technical possession at a point in time after the actual crime, not possession with intent to defraud. It is of course, impossible to calculate how the jury dealt with this phase of the charge but unquestionably it creates substantial confusion and may well have resulted in conviction of the defendant.

CONCLUSION

Because of the foregoing the defendant respectfully submits:

(a) That the Court was in error in admitting evidence seized pursuant to an unlawful search and that the case should be remanded for a new trial in accordance with the Court's ruling with respect to such illegal evidence; or

(b) The Government introduced insufficient evidence upon which to convict the defendant and the case should be remanded to the Trial Court with an instruction to dismiss the indictment.

Dated: New York, New York  
July 18, 1974.

Respectfully submitted,

BENJAMIN J. GOLUB  
Attorney for Defendant  
Office & P.O. Address  
10 East 40th Street  
New York, New York 10016  
(212) 686-4300